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In the Supreme Court of the United States**OCTOBER TERM, 1984**

EDNA GOLDSTEIN, PETITIONER**v.****ROBERT E. KELLEHER, ET AL.**

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner contends that the federal magistrate's trial and entry of judgment in this action with the consent of the parties pursuant to 28 U.S.C. 636(c) violates Article III of the Constitution.

Petitioner, invoking the jurisdiction of the United States District Court for the District of Massachusetts under 28 U.S.C. 1332, brought this medical malpractice action against respondents Robert E. Kelleher and Rockdale Medical Corporation. With the consent of the parties, the case was referred to a United States Magistrate, who conducted a jury trial. The magistrate directed a verdict against petitioner on one count of her complaint; on the other count, the jury found that the defendants had not damaged petitioner. The magistrate ordered judgment entered for the defendants. Pet. App. 3a.

In her reply brief on appeal, petitioner asserted for the first time that the magistrate's exercise of authority in presiding at trial and directing entry of judgment — a procedure authorized by 28 U.S.C. 636(c) — violates Article III of the Constitution (Pet. App. 3a-4a). The court of appeals notified the Attorney General of the constitutional challenge, and the court granted the subsequent motion of the United States to intervene. See 28 U.S.C. 2403(a). The court of appeals then sustained the constitutionality of the consensual reference to the magistrate (Pet. App. 2a-5a) and affirmed the judgment (Pet. App. 2a-14a; 728 F.2d 32).

Every court of appeals that has considered the issue has agreed with the court below that 28 U.S.C. 636(c) is constitutional. See *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984), petition for cert. pending, No. 83-1616; *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), petition for cert. pending, No. 83-1873; *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, No. 83-1874 (8th Cir. July 11, 1984) (en banc); *Puryear v. Ede's, Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983). For the reasons stated in our brief in opposition in *Foreman v. Collins, supra*,¹ this question does not merit review by this Court.²

¹We have sent copies of this brief to counsel for the other parties.

²Petitioner is incorrect in asserting (Pet. 6, 31-32) that the court of appeals' decision conflicts with *Glover v. Alabama Board of Corrections*, 660 F.2d 120 (5th Cir. 1981) (on rehearing); contrary to petitioner's assertion, *Glover* did not hold that only the clerk of the court, and not the district judge, may ask the parties if they consent to referring the case to the magistrate. We note that while petitioner alleges that the judge made the inquiry in this case, she does not suggest that she would have withheld her consent if the clerk instead of the judge had made the inquiry (see Pet. 5, 31). Petitioner also asserts (Pet. 23) that the court of

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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appeals' decision conflicts with *Harding v. Kurco, Inc.*, 603 F.2d 813 (10th Cir. 1979), and *Reciprocal Exchange v. Noland*, 542 F.2d 462 (8th Cir. 1976), but both of those cases were decided before Section 636(c) was enacted.